Supreme Court, U.S.
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No. 96-7171

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,
Petitioner,

vs.

MICHAEL L. KEMNA and
JEREMIAH W. (JAY) NIXON,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENTS

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
Chief Deputy Attorney General
STEPHEN D. HAWKE
Assistant Attorney General
STACY L. ANDERSON
Assistant Attorney General
MICHAEL J. SPILLANE
Assistant Attorney General
Counsel of Record
Post Office Box 899
Jefferson City Missouri 65102
(573) 751-3321

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Constitutional and Statutory Provisions

Article III, Section 2 of the United States Constitution states in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States; . . .

Statement of the Case

This case presents the question whether Randy G. Spencer can continue to use a petition for habeas corpus as a means for attacking the revocation of his parole, even though he was reparoled in August 1993 and completed his sentence in October of that year. The Circuit Court of Jackson County, Missouri, sentenced Spencer on November 8, 1990, to concurrent terms of three years imprisonment for burglary and stealing (Joint Appendix, hereinafter J.A. 67-69). The Missouri Board of Probation and Parole placed Spencer on parole on April 16, 1991 (J.A., 71); *see* MO. REV. STAT. § 217.690 (1994) (the Missouri parole statute). This case arose from Spencer's violation of the terms of his first parole.

On July 17, 1992 Parole Officer Jonathan Tintinger issued a warrant for Spencer's arrest for two violations of the conditions of his parole. Condition #1 [1] required Spencer to obey state and federal laws and municipal ordinances and to report all arrests to his probation and parole officer within 48 hours (J.A. 55). Condition #6 required Spencer not to possess or use any controlled substance except as prescribed by a licensed medical practitioner (J.A. 56). Spencer violated condition #1 by committing the crime of rape and violated condition #6 by possessing or using crack cocaine (J.A. 112-114).

Officer Tintinger interviewed Spencer after he was arrested on July 17, 1992 (J.A. 71). Tintinger prepared an initial violation report on July 27, 1992. The report listed three charges -- violation of conditions #1, and #6 as indicated in the warrant, plus a violation of #7 (J.A. 72). Condition #7 barred Spencer from owning or possessing a

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[1] The standard conditions a Missouri inmate must meet to remain on parole are set out at MO. CODE REGS. tit. 14, § 80-3.010.

dangerous weapon (J.A. 56). Tintinger advised Spencer that any statements he made may be included in the violation report, and gave Spencer a booklet entitled "Rights of Alleged Violator." Spencer then waived a preliminary hearing (J.A. 72).[2]

Officer Tintinger's parole violation report was based on his interview of Spencer and on a police report from the Kansas City, Missouri Police Department (J.A. 72). The violation report said that at 6:00 p.m. on June 3, 1992, Spencer received a ride home from a crack house from a woman he met at the house (J.A. 72-73). The woman told the police that she went up to Spencer's apartment after he offered to give her gas money and that the two smoked crack in Spencer's apartment (J.A. 73). The report said that the woman then attempted to leave Spencer's apartment (J.A. 73). The victim said Spencer then pushed her to the floor, got on top of her, and beat her in the face with his fists until she begged him to stop (J.A. 73). Spencer then raped her (J.A. 73). He then directed her to drive him back to the crack house (J.A. 73). The victim told the police that at some point during the rape, Spencer pressed a screwdriver against her side (J.A. 77).

Male occupants of the crack house chased Spencer away after the victim told them about the attack (J.A. 73). She went to the Independence Regional Hospital for rape treatment; the physician's report indicated "bruises on the left side of the mouth with moderate swelling, abrasion of inner upper left lip, tender but not discolored on the right angular jaw" (J.A. 73). Hospital personnel reported the rape, and the Kansas City Police were dispatched (J.A. 73).

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[2] The report does not specify whether the waiver included the violation of condition #7, which was not listed in the violation warrant.

On June 13, 1992, police received an anonymous tip that Spencer was the rapist (J.A. 73). The police showed the victim a six photo spread on June 23, 1992, from which she identified Spencer (J.A. 74). Spencer was detained for questioning on July 16, 1992. He told investigating detectives, "her purse was on top of my refrigerator and I attempted to try to get the dope and pushed her away . . . she fell and landed on my bed" (J.A. 74). When asked if he hit the victim in her head, Spencer replied: "not intentionally not with my knowledge, it may have happened when I pushed her away from the purse" (J.A. 74). Spencer told the police he had consensual sex with the victim (J.A. 74).

At his interview with Officer Tintinger, Spencer had no response to the charge that he committed rape. Spencer admitted smoking crack cocaine. Spencer denied only the third charge: using a screwdriver as a weapon against the victim (J.A. 74-75). Tintinger recommended that Spencer be placed in the Farmington Mineral Area Treatment Center (J.A. 75). He noted that Spencer had previously received a violation for using cocaine on April 2, 1992, at Fellowship House and had used cocaine again within two weeks of his May 21, 1992, discharge from Fellowship House (J.A. 75). Spencer had been convicted of sodomy in 1983 and was a registered sex offender (J.A. 75). Tintinger concluded that Spencer "is obviously a violent and impulsive individual who represents a clear danger to the community" and that "Spencer has every intention of continuing to use drugs whenever possible despite what help is offered him" (J.A. 75). Although Tintinger held in abeyance his ultimate recommendation on violations of conditions #1 and #7, he found it "necessary to immediately remove Spencer from the community" (J.A. 75).

On September 14, 1992, Officer Peggy S. McClure, the parole officer assigned to the institution where Spencer

was sent after his arrest for parole violations, interviewed Spencer and prepared her own report. McClure listed three alleged parole violations and specified that Spencer had waived a preliminary hearing (J.A. 60-61). Spencer again admitted violating condition #6 of his parole by smoking crack cocaine. He again denied violating condition #7, using a dangerous weapon, and now denied violating #1 by raping the victim (J.A. 61-63). McClure found that there was significant reason to believe Spencer had violated the conditions of his parole and recommended revocation. Spencer signed a request for a revocation hearing (J.A. 59-60).

Spencer appeared at a hearing before the Missouri Board of Probation and Parole on September 24, 1992 (J.A. 55). The Board then revoked Spencer's parole (J.A. 55-56). Relying on the initial violation report, the Board found that Spencer had violated conditions #1, #6 and #7 of his parole.

Spencer then challenged the revocation in the Circuit Court of DeKalb County, Missouri; the Missouri Court of Appeals, Western District; and the Supreme Court of Missouri. All of these courts denied relief on Spencer's claims (J.A. 8-9).

The federal court proceedings at issue in this appeal began on April 1, 1993 -- barely more than four months before Spencer received renewed parole, and not much more than six months before the end of Spencer's sentence. On April 1, Spencer filed the habeas corpus petition at issue here under 28 U.S.C. §2254 in the District Court for the Western District of Missouri (J.A. 5). Spencer made four allegations that the revocation proceedings violated his due process rights: he was denied a preliminary hearing on one of the three counts on which his parole was revoked; his conditional release date was moved back without a hearing; his parole hearing was flawed; and he did not receive a timely

explanation of the facts and evidence against him (J.A. 12-14).

Spencer filed his petition on April 1, 1993, though the filing fee did not reach the court until April 15, 1993. At that time, the district court had in hand what it needed to begin action on the petition. On May 3, the district court signed an order directing Respondent[3], Superintendent Mike Kemna, to file within 30 days an answer to the petition for habeas corpus (J.A. 17). The respondent later requested and was granted extensions of time. The first, until June 23, 1993, was sought because Respondent's assigned counsel had been delayed by the preparation of numerous responses and briefs and several oral arguments (J.A. 19). The motion for extension was not meant to vex or harass Spencer or to infringe on his substantial rights (J.A. 19-20). The motion for extension was granted on June 3, 1993. Spencer filed objections to the extension motion on June 8, 1993, accusing counsel of negligence and of lying to the court (J.A. 22-25).

On June 23, 1993, Respondent requested an additional 14-day extension of time until July 7, 1993, again because counsel had been delayed by responding to numerous federal habeas corpus petitions, writing and filing several briefs in the court of appeals, and preparing for and making several oral arguments in the court of appeals (J.A. 26-27). On June 30, 1993, Spencer filed an objection to the second request for extension of time (J.A. 30). Again, he questioned the truthfulness of the reasons given (J.A. 30-35). This motion for extension was granted on June 30, 1993 (J.A. 36).

Respondent filed a timely answer to the district court's

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[3]The attorney general of Missouri and the superintendent of the institution where petitioner is confined are now nominal respondents. These parties will be referred to as Respondent.

show cause order on July 7, 1993 (J.A. 37). The response argued that Spencer's admitted waiver of a preliminary hearing on two of the three conditions of his parole satisfied the requirement for a preliminary hearing and that the record showed that Spencer had waived a preliminary hearing (J.A. 41). It argued that Spencer's complaint about the determination of his conditional release date was a state law issue best left to the state courts (J.A. 42). The response argued that at his parole hearing petitioner was afforded all the process he was due under the circumstances (J.A. 44-45). The response informed the court in a footnote that Spencer was scheduled for release on parole on August 7, 1993 and that he would complete his sentence on October 16, 1993 (J.A. 37-38).

On July 14, 1993, Spencer requested "final disposition of his case," arguing that relief through habeas corpus would not be available after his release on parole on August 7, 1993 when, Spencer believed, the case would become moot (J.A. 78-79). Apparently while that request was en route to the district judge, the court on July 15, 1993 entered an order requesting Spencer to reply to respondent's answer within 30 days (J.A. 121). *See* 28 U.S.C. § 2248. On July 22, 1993 Spencer wrote a letter to the clerk of the court informing the clerk that his "request for final disposition" contained his response to Respondent's answer. Spencer reiterated that because of his pending release, habeas relief would not be available by the time 30 days had expired (J.A. 122-123). Spencer filed a supplemental response on July 26, 1993, adding the allegation that the respondent admitted that no live witnesses adverse to Spencer were called at the parole hearing (J.A. 124-125).

Spencer was released on August 7, 1993, and his sentence expired on October 16, 1993. On February 3, 1994, the district court issued an order taking notice of Spencer's motion for final disposition and stating, "The resolution of

this case will not be delayed beyond the requirements of this Court's docket. *See United States v. Samples*, 897 F.2d 193, 195 (5th Cir. 1990)." (J.A. 127). The district court dismissed the case as moot on August 23, 1995, because Spencer was released from incarceration approximately four months after filing his case and completed his maximum term of imprisonment approximately two months later (J.A. 130).

On September 5, 1995, Spencer filed a notice of appeal. On October 5, 1995, the district court denied an application for a certificate of probable cause (J.A. 128). The United States Court of Appeals for the Eighth Circuit granted a certificate of probable cause on November 16, 1995 (J.A. 2).

In his brief to the court of appeals, Spencer alleged that the district court should have considered his case on the merits. Spencer argued that it was the fault of Respondent and the district court that the case became moot and that the case should be remanded for a hearing on that issue (Brief of Appellant in the court below; henceforth App. 8th Cir. Br. 17-21). He then argued that mootness should be disregarded because of a public policy exception to the mootness doctrine (App. 8th Cir. Br. 21-33). Finally, he argued that his petition was not moot after all because his future release on parole from a new conviction would be affected by the additional blemish on his record created by the parole violation (App. 8th Cir. Br. 33-35). Although Spencer argued that any possible consequence of his revocation should defeat mootness, he identified no specific consequences except that hypothetical effect on future parole consideration (App. 8th Cir. Br.).

Respondent pointed out that this Court's decision in *Lane v. Williams*, 455 U.S. 624 (1982), defeated both

petitioner's argument that he fit within an exception to the mootness doctrine and his argument that his petition was not moot because of the collateral consequence Spencer alleged (Respondent's Brief in the court below; henceforth Resp. 8th Cir. Br. at 6-8). Respondent also pointed out that the time required for the actions of Respondent to answer and for the district court to take up Spencer's case were reasonable in light of the large caseloads in federal courts in Missouri, and that the time required to act on Spencer's claim was not out of line with the nationwide average time for resolving habeas corpus petitions. Respondent further pointed out that even if the case had been decided by the district court prior to petitioner's release it would have become moot on appeal and that there was no justification for moving petitioner's case ahead of the other litigants who also believed their cases merited the attention of Respondent and the district court (Resp. 8th Cir. 6-10).

On August 5, 1995, the court of appeals affirmed the district court's decision (J.A. 131-139). The court recognized the rationale of courts of appeals in other circuits that distinguished *Lane v. Williams* (J.A. 135). The court below, however, held that *Lane v. Williams* must be applied to Spencer's case:

> It must be recognized, however that the court in *Lane* held that the possible collateral consequences in future parole hearings stemming from a finding of parole violation are insufficient to overcome mootness [citation omitted]. This part of the Court's holding Spencer cannot overcome.

(J.A. 135). Missouri law, the court noted, places even less emphasis on a past parole revocation in considering reparole than did the Illinois parole regulations considered in *Lane*. If

the consequence to Spencer was less speculative than the consequence in *Lane*, it was only because Spencer had already reoffended and been convicted again of a new crime -- which was entirely Spencer's fault (J.A. 137). The court also rejected the argument that Spencer's case should be found to fit within a public policy exception to the mootness doctrine (J.A. 138).

In a concurring opinion, Judge Heaney agreed that the court was bound by this Court's decision in *Lane v. Williams*, but said that if he were writing on a clean slate, he would reverse (J.A. 138-139).

Spencer filed a petition for writ of certiorari with this Court alleging that the court of appeals failed to address delays that were the fault of Respondent and the district court, and that the existence of such delays demanded exercise of this Court's supervisory power (Certiorari Petition; henceforth Cert. Pet. 14-18). Spencer also alleged that a conflict existed among the circuit courts of appeals on the correct interpretation and application of *Lane v. Williams* (Cert. Pet. 19). Spencer confined his claimed injuries from having his parole revoked to the one that he cited to the court of appeals: the possibility, as in *Lane*, that the revocation would adversely affect his consideration for parole on a new sentence (*see* Cert. Pet. 19-21).[4]

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[4]Although it is not part of the record before the federal courts, pursuant to the continuing duty to inform the Court of any development that may affect the outcome of the case Respondent states the following: Randy G. Spencer is scheduled for parole on his current seven-year sentence on January 24, 1999, and as a condition of this parole he will be subjected to electronic monitoring until the expiration of his sentence on May 24, 2001. This scheduled parole date is dependent on his continued good conduct and an acceptable release plan.

Summary of Argument

Under this Court's precedents, most specifically *Lane v. Williams*, 455 U.S. 624 (1982), the writ of habeas corpus is available under the Constitution and 28 U.S.C. § 2254 to challenge a parole revocation only until the parolee is reparoled or, at the latest, until his sentence expires. The petitioner here, Randy G. Spencer, asks the Court to change that rule. He proposes the unprecedented step of placing parole revocations on the same footing with criminal convictions. In the alternative, he asks that the Court adopt a rule that would require lower courts to give the highest priority to deciding habeas petitions brought by those who will shortly be released without judicial intervention. The Court should reject both options.

The doctrine of mootness, which forms the basis for limiting the life of habeas petitions challenging parole revocations, is the practical result of the decision of the drafters of the Constitution to limit federal court jurisdiction to "cases or controversies." Thus this Court has repeatedly held that "Article III of the Constitution of the United States limits the federal judicial power to 'Cases' or 'Controversies' thereby entailing as an irreducible minimum that there be (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct and (3) likelihood that the injury will be redressed by a favorable decision." *United Food and Commercial Workers v. Brown Group*, 116 S.Ct. 1529, 1533 (1996). A party seeking to invoke the power of the federal courts to adjudicate a case "must prove an injury fairly traceable to the . . . allegedly unlawful conduct and likely to be redressed by the requested relief." *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). It is obvious that granting a writ of habeas corpus would redress ills being suffered by petitioners who are still in custody. It is nearly as apparent that the writ, as a vehicle for removing the civil

disabilities that necessarily result from a conviction, can redress the ills of petitioners who are challenging their criminal convictions. But what is at issue here is whether granting the writ sought by Spencer – who was released from custody shortly after his petition was filed, and who is not challenging his conviction – meets the constitutional standards for federal court jurisdiction. Under *Lane v. Williams*, it does not.

Spencer's petition for writ of habeas corpus alleged that the procedures used in a state parole revocation hearing did not comply with the requirements of the due process clause. Spencer was reparoled approximately four months after filing his petition for habeas corpus; he completed his maximum term of imprisonment approximately two months later. Then, because resolving his disagreement with the state over the process of his revocation would no longer meet the requirements of the "case or controversy" requirement, the United States District Court dismissed his habeas corpus action as moot (J.A. 130). The district court followed *Lane v. Williams*, where this Court rejected the idea that the possibility of a future injury from a parole revocation is enough to prevent a case from becoming moot. The Court thus distinguished parole revocations from criminal convictions. A criminal conviction necessarily results in civil disabilities, as this Court recognized in *Sibron v. New York*, 392 U.S. 40 (1968). A parole revocation does not have comparable results.

In his brief to the court below, Spencer could identify only one hypothetical future event as a "civil disability" that could justify continued consideration of his habeas petition even under the rationale of *Sibron*: the possibility that having been convicted of another crime, his past parole revocation could affect his chances of parole from his new sentence. But this Court rejected that very proposition in *Lane v.*

Williams. There is a considerable gap between the civil disabilities that form the basis for the *Sibron* rule (*e.g.*, losing the right to vote or hold office), and the speculative possibility that Spencer and *Lane* presented. Spencer's assertion was that he has committed and been convicted of another crime, he will become eligible for parole, and that the presence of a prior revocation on his record will affect whether he will be paroled. The court of appeals, following *Lane*, found the remote likelihood of such a scenario to be insufficient to create jurisdiction to review Spencer's underlying claim. The Eighth Circuit declined to follow the lead of other circuit courts of appeals, which had overlooked the remoteness and uncertainty of the alleged results of parole violations and found them to be equal to the civil disabilities that result from a criminal conviction. Because the gap between the results of criminal convictions and of parole revocations is real and substantial, the decision of the Eighth Circuit should be affirmed.

Recognizing that this Court dealt adversely in *Lane* with the single alleged injury he cited to the court of appeals, Spencer now belittles his reliance on that alleged ill and adds several other effects that, he claims, were sufficient to create jurisdiction permitting review by the district court. These were the possibility of enhanced sentencing for future state or federal convictions, the possibility of future impeachment, the possibility that Spencer may be tried in federal court for a future sexual assault where the revocation would be admissible as substantive evidence, and that Spencer would be precluded from bringing a civil rights claim under 42 U.S.C. §1983 without first filing a successful habeas petition.[5]

[5] Since Spencer's petition for certiorari alleged only the injury raised in the court below, this is respondent's first appropriate opportunity to point out the expanded basis on which Spencer seeks to establish jurisdiction.

Because Spencer did not present any of these injuries in his brief to the court below in order to meet his obligation to establish jurisdiction, he may not now raise these alleged injuries in this Court. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362-363 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970).

Even if Spencer had timely raised these additional claims, they would be inadequate to create jurisdiction for review. Many of them are based on misreadings of the law. All of them are either too speculative to be injuries in fact, or are not tied to the only challenged conduct, the alleged inadequacies in the parole revocation hearing process. Thus, when explaining his alleged injuries, Spencer repeatedly refers to the underlying charges of rape and drug use. Yet, a decision on Spencer's petition would affect only the parole revocation and not the underlying charges that he finds to be so troubling. Allowing those challenging parole revocations, not criminal convictions, to use the kind of possible future effects that Spencer lists for purposes of deferring mootness under an extension of *Sibron* would constitute a radical change in the scope of the habeas remedy. That is particularly true for Spencer's broad assertion that continued federal court jurisdiction could be justified by the possibility that the act complained of might somehow be used to impeach his testimony.

Spencer also argues that because of the particular facts of his case, mootness should be excused. In fact, Spencer makes a general argument that mootness should be excused in challenges to parole revocations because some litigants will otherwise not have a federal forum in which to pursue their claims. But in light of the decisions of this Court firmly establishing that there is no constitutional right to a federal forum for review of habeas petitioners' claims, and the absence of any authority for Spencer's claimed exemption

from the mootness doctrine, that argument makes no sense here. The petitioner had his claims heard by three state courts but disagrees with the outcome of these proceedings. Despite that disagreement he was released on parole again four months after filing his petition in the district court. His case justifies neither a wholesale modification of the mootness rule, and the resulting increase in the courts' workload, nor the creation of an exception to address his allegedly unique claims, and the resulting need to address in the mootness analysis the particular situation presented by each habeas petitioner challenging a parole violation.

Citing his alleged need for a federal forum, Spencer presents an alternative to modifying the mootness rule: imposing on the federal courts a requirement that his (and, presumably, every) habeas petition be decided before it can become moot. He does not explain how such a rule could be implemented. Nor, critically, does he explain how it could be fair to other litigants -- particularly to those prisoners whose petitions would be given lower priority because their sentences had years, rather than months, left to run.

The district court and the respondent acted reasonably in responding to Spencer's habeas corpus petition. Though the respondent sought and received from the district court two extensions of time, the petition was briefed and ready for decision approximately three months after the petition and the necessary accompanying documents were in the hands of the district court. Spencer was released on parole less than a month later, and his maximum sentence expired approximately two months after that. Spencer has pointed to nothing that would show that between the day he completed the filing of his petition and the end of his sentence, either the district court or the respondent did anything but what the rules of reason and justice required them to do. His case does not present a justification for a new and unworkable rule of judicial management requiring all federal courts to give

dramatically expedited treatment and priority to deciding petitions filed by those prisoners whose release is most imminent.

ARGUMENT

I. The alleged consequences of a parole revocation identified by Spencer are not the kinds of resulting civil disabilities that create a constitutionally recognizable "case or controversy" such that the federal courts can retain jurisdiction over his claims after his sentence has been completed.

A. The rule in *Lane v. Williams*, which precludes one challenging the revocation from demanding the courts' attention after his unconditional release, is mandated by the "case or controversy" requirement of Article III.

Petitioner Spencer asks this Court to limit the impact of an important constitutional rule: the declaration in Article III, Section 2 of the United States Constitution that a case or controversy must exist in order for a federal court to have jurisdiction to review a claim. The minimum requirement for the existence of federal jurisdiction is 1) an injury in fact; 2) a causal relationship between the injury in fact and the challenged conduct; and 3) likelihood that the injury will be redressed by a favorable decision. *United Food and Commercial Workes v. Brown Group*, 116 S.Ct. 1529, 1533 (1996). In *Lane v. Williams*, 455 U.S. 624 (1982), this Court set forth how that test applies to the consequences of a parole revocation if the petitioner has been released from custody while a habeas corpus petition is still pending. Spencer asks the Court to disavow its declaration in *Lane* and allow him--four years after he was reparoled and his sentence expired--to use a petition for writ of habeas corpus to challenge procedures used in revoking his parole in 1992.

The three-element test for jurisdiction was further explained in *Northeastern Florida Chapter of the Associated*

Gen. Contractors of Am. v. City of Jacksonville, Florida, 508 U.S. 656, 663-664 (1993). There the Court referred to the "long line of cases" addressing the "case or controversy" requirement and elaborated on three elements a party must prove to retain federal court jurisdiction:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *Lujan, supra*, 504 U.S., at 560 [*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)] (citations, footnote, and internal quotation marks omitted); (2) a casual relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative," *Allen v. Wright, supra*, 468 U.S., at 752. [*Allen v. Wright*, 468 U.S. 737 (1984)].

The Court held that those three elements are the "irreducible minimum" for federal jurisdiction. *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

Parties seeking to invoke jurisdiction must prove that their claims meet this "irreducible minimum" test. *See*

Franklin v. Massachusetts, 505 U.S. 788, 802 (1992). Because these elements are not just pleading requirements but an indispensable part of the case, each element must be supported, not merely alleged. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

The doctrine of mootness is the result of the requirement that the three element "irreducible minimum" must exist at any time a federal court acts, not merely when a complaint or petition is filed. Thus, mootness occurs when one or more elements of the test ceases to exist, depriving the court of jurisdiction. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (noting that the "case or controversy" requirement continues through all stages of review and applying the three-element test to find a claim moot on appeal, although a "case or controversy" existed when the suit was filed). *See also DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). Parties may still disagree about an underlying legal or factual issue. But without more, they cannot receive a federal court's attention merely because of that disagreement. Plaintiffs may fear future consequences. But "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990), *see also id.* at 156-161 (discussing this Court's precedents on what constitutes an injury in fact). If a litigant fails to set forth facts sufficient to meet the requirements of Article III, "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Id.* at 156-157.

This Court clarified the application of the mootness doctrine to habeas petitions challenging criminal convictions in three cases decided in the 1960's. First, in *Parker v. Ellis*, 362 U.S. 574 (1960) (per curiam), this Court held that a habeas petition challenging a criminal conviction became moot when the prisoner was no longer in custody because the

petitioner had received the only remedy the habeas corpus statute authorized: release from detention. Then in *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court recognized that the substantial issue in *Parker v. Ellis* was interpretation of the custody requirement of the habeas corpus act. *Id.* at 238. This Court held that the 1966 amendments to the habeas corpus statute permitted relief if the petition was filed while the petitioner was in custody, and that the civil disabilities the petitioner in *Carafas* suffered as a result of his conviction (a bar from engaging in certain businesses, a bar from serving as a union official for a certain time, a bar from voting in New York state elections, and bar a from serving on juries) were sufficient injuries to prevent the case from becoming moot after his release. *Id.* at 237-240. Finally, in *Sibron v. New York*, 392 U.S. 40, 58 (1968), the Court adopted the doctrine that because of the serious civil disabilities that accompany a criminal conviction, a habeas corpus challenge to a criminal conviction is not moot unless it is shown that no collateral legal consequences will be imposed based on the challenged conviction.

These cases are all consistent with the three element test for jurisdiction. Assuming, as the Court concluded in *Parker*, that the habeas corpus act in 1960 provided no remedy that could be granted unless accompanied by release from custody, then the third element of the test could not then be met after a petitioner was released from custody regardless of the collateral consequences accompanying a conviction. Since a remedy was not statutorily available, no further mootness analysis was requried. When the Court later concluded that relief could statutorily be granted without a petitioner's being in physical custody, further mootness analysis became necessary in *Carafas* and *Sibron* to determine if a "case or controversy" existed after release of a prisoner challenging his conviction.

The Court's holdings in *Sibron* and *Carafas* recognized a significant shift in the meaning of the custody requirement in the habeas statute, but they did not mark a departure from past jurisprudence on the "case or controversy clause." The *Sibron* doctrine is simply a recognition that criminal convictions are self-evidently injuries that create a "case or controversy" due to the serious *present* civil disabilities that necessarily result from criminal convictions. *See Carafas v. LaVallee*, 391 U.S. at 237-238. This Court in *Sibron* did not hold or suggest that a *future* hypothetical civil disability could create jurisdiction.

In *Lane v. Williams*, this Court clearly defined a critical limit on the *Sibron* holding. While Sibron had challenged his criminal conviction, Lane challenged only a sentence resulting in a parole term that was later revoked, not the conviction itself. Therefore, the Court was asked if the collateral consequences of a parole revocation, like the collateral consequences of a conviction, defeated mootness. In language that could hardly be more clear, this Court said the answer was no: "The doctrine of *Carafas* and *Sibron* is not applicable in this case." *Lane v. Williams*, 455 U.S. at 633.

The difference, the Court explained, was in the nature of the effects of a parole violation versus the effects of a conviction. "No civil disabilities such as those cited in *Carafas* result from a finding that an individual has violated parole." *Id.* at 633. This Court noted that tangible collateral consequences sufficient to prevent mootness are present disabilities such as bars from voting, holding public office, or serving on a jury, not future potential disabilities such as a negative affect on future parole chances. *Id.* at 633 n.13. None of the present disabilities identified in *Carafas*, nor anything comparable to them, results from a parole revocation.

This Court specifically addressed in *Lane* the particular injury alleged below by Spencer, a revocation's effect on future parole consideration. The Court pointed out that unlike the injuries considered in *Sibron*, the impact of a parole revocation on future parole consideration was speculative. A parole revocation was only one factor that would be considered at a future parole hearing. Moreover, for the petitioner to be again considered for parole would require an intervening illegal act. *Id.* This Court also addressed the possible impact on discretionary decisions that might be made by a future employer or sentencing judge. Those decisions would be more affected by the conduct underlying a parole revocation than by the fact of revocation. *Id.* at 632-633.

Each of these injuries was hypothetical and conjectural as opposed to actual or imminent, and thus did not constitute an injury in fact. *See Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Florida*, 508 U.S. 656, 663-664 (1993). None met the constitutional test. None presented a real as opposed to a speculative likelihood that a favorable decision on the habeas petition would remedy the alleged injury. *See Id.*

The Court in *Lane v. Williams* thus upheld the "case or controversy requirement" against an attempt to expand it to include hypothetical future injuries. The Court recognized a distinction between the present and actual disabilities that result from legislation limiting the rights of those convicted of crimes and the less tangible possibility that a parole revocation may have future adverse consequences. The "case or controversy" requirement dictates that the class of cases in which jurisdiction is presumed to exist be limited to cases, like habeas petitions challenging criminal convictions, in which there is no question that the three element

jurisdictional test has been met. Spencer's argument here is an attack on the logical and constitutionally-based approach this Court established in *Lane v. Williams* for applying a mootness analysis.

This Court's approach in *Lane v. Williams* is neither badly reasoned nor unworkable and should be followed. *See United States v. International Bus. Machines Corp.*, 116 S.Ct. 1793, 1791 (1996). It is a reasonable and perhaps inevitable application of general principles concerning what creates a case or controversy to the specific case of the collateral consequences of a parole revocation. To depart from it would be an unjustified abandonment of the doctrine of *stare decisis*, which as a general rule directs this Court to adhere to the explication of rules of law in past cases as well to their holdings. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). This Court's decision and reasoning in *Lane v. Williams* should be followed. The *Sibron* doctrine should not be expanded from the tangible collateral consequences of criminal convictions to the ephemeral speculative consequences Spencer attributes to parole revocations.

B. Spencer's burden of showing that he will suffer from a present civil disability should not be reduced, either by permitting Spencer to merely hypothesize possible future uses of his revocation record, or by shifting to the State the burden of imagining and then disproving all conceivable future impacts.

The critically important question of allocating burdens of proof is affected by the key distinction between the *Sibron* rule applicable to criminal convictions and the general rule applied to parole revocations in *Lane v. Williams*, *i.e.*, from the fact that the existence of concrete present civil disabilities is self-evident in the case of a criminal conviction, but not in the case of a parole revocation. Rather than impose on the

petitioner a burden of proving the existence of a harm that can be remedied, the *Sibron* rule presumes jurisdiction because of the well-known present civil disabilities that necessarily accompany a conviction. Thus, petitioners challenging criminal convictions can avoid a mootness finding by merely pointing to statutory and similarly inexorable impacts. But the Court in *Lane v. Williams* was unwilling to presume that the consequences of a parole revocation would meet this test because the present civil disabilities that necessarily accompany a criminal conviction do not accompany a parole revocation. The Court in *Lane v. Williams* thus left the petitioner with the burden of showing that he suffered from an injury in fact, caused by the challenged conduct and likely to be remedied by a favorable decision. This burden is consistent with and required by this Court's jurisprudence discussing the "case or controversy" clause.

Spencer is asking this Court to announce a presumption that a parole revocation itself, not the original conviction nor conduct underlying the revocation, causes sufficient harm even after a petitioner's release on renewed parole to permit continued jurisdiction. This would be a momentous step not supported by law or reason. The present civil disabilities that result from a criminal conviction, such as restrictions on voting, jury duty, holding office and engaging in certain businesses, do not result from a parole revocation. Similarly, the fact of a criminal conviction may lead to enhancement of a future criminal sentence or future testimonial impeachment. *See Evitts v. Lucey*, 469 U.S. 387, 392 (1985) But the fact of a parole revocation does not have similar consequences. In fact, the principal ills newly alleged by Spencer and discussed in detail below result from the conduct that caused his parole to be revoked. Yet Spencer would have this Court presume causation, and force the state to conceive of and then disprove any potential consequences

of a revocation.

Of course, proving the negative, as *Sibron* would require if a state claimed that a petition challenging a conviction had become moot, is always problematic. If the hypothetical ills Spencer lists are sufficient (*e.g.*, a revocation might be used to impeach future testimony), it may be impossible to prevent every revoked parolee from seeking relief step-by-step through the federal courts, despite having been reparoled or otherwise released from custody long before. It is impossible to quantify the number of petitions now dismissed as moot or never filed that would clog the federal courts, were the *Sibron* doctrine expanded beyond criminal convictions. There are many groups that would qualify to pursue habeas relief, as inmates who receive conduct violations, or are denied parole for bad conduct, or denied time off for good behavior might all be handed a basis for demanding federal relief. For example, a future character witness could be asked about his knowledge of any of these events and its effect on his opinion, just as he could be asked about a parole revocation. Opening the courthouse doors to such cases would have the practical effect of delaying petitions by inmates challenging convictions or actual confinement. Nothing in the law or the facts of this case justifies such a change.

C. Spencer has been unable to prove that his 1992 parole revocation would affect his future eligibility for parole. He should not now be allowed to allege new injuries.

Spencer's allegation that his parole revocation will negatively affect future parole consideration is the only alleged injury that is properly before this Court. Spencer's other four allegations of injury were not briefed or considered

in the court below. The court below found that the single alleged injury is insufficient to create jurisdiction, for the effect of a parole revocation on future parole consideration in Missouri is even more speculative than the effect in Illinois which this Court found inadequate to create jurisdiction in *Lane v. Williams*. The court below used the analysis found in *Lane v. Williams*, noting the discretion permitted by Missouri law, and emphasizing that the law applies to Spencer only because he committed another crime. Spencer thus is the intervening cause of any effects that will occur (J.A. 135-137). The court's analysis of Missouri law is correct. That law gives the parole board "almost unlimited discretion in whether to grant parole release." *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. 1995) (en banc) (citing *Ingrassia v. Purkett*, 985 F.2d 987, 988 (8th Cir. 1993)); MO. REV. STAT. §217.690 (1994). Missouri parole regulations set forth in MO. CODE REGS. tit. 14, § 80-2.010 "do not limit the broad scope of discretion given the Board by 217.690." *Shaw v. Mo. Bd. of Probation and Parole*, 937 S.W.2d 771, 772 (Mo.Ct.App. 1997). But those regulations show how speculative Spencer's claim of harm is.

Whether an inmate has ever had a probation or parole revoked is one of nine "conviction and confinement" measures that are first considered in determining parole eligibility. These nine factors are combined with the seriousness of the offense and the length of sentence in arriving at a guideline range in which parole is normally granted. *See* State of Missouri Department of Corrections Board of Probation, RULES AND REGULATIONS GOVERNING THE GRANTING OF PAROLES, CONDITIONAL RELEASES AND RELATED PROCEDURES, MBPP-259, at 18-23 (1992).[6] The fact of a parole revocation is not itself something that the parole board is required to consider in granting parole; it is

[6] Twelve copies of this booklet will be lodged with the Court.

only a factor in setting a guideline range within which the board normally grants parole, absent other considerations. And under the Missouri regulations, the only question is whether Spencer ever had any parole revoked (*id.* at 23), not how many times or for what violations.

Spencer has not alleged or established that the challenged revocation would affect even a single factor considered in arriving at guideline range for parole.[7] Yet it was Spencer's responsibility at each step of the proceeding to prove an injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990); *Lujan v. Defenders of World Wildlife*, 504 U.S. 555, 562 (1992); *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); *Allen v. Wright*, 468 U.S. 737, 751-753 (1984). Spencer did not allege injuries from the possibility of future sentence enhancement and from the possibility of future impeachment until his reply to the brief in opposition to the petition for certiorari. He did not allege the injury of the use of the parole revocation under FED.R.EVID. 413 or the injury or preclusion from filing suit under 42 U.S.C. §1983 until his main brief to this Court. In his main brief, however, Spencer now questions whether these injuries defeat mootness (Spencer Br. i). The possible effect on future parole eligibility was the only specific injury alleged in the certiorari petition. It was the only injury alleged in Spencer's second question presented as it was drafted in the certiorari petition (Cert. Pet.).

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[7] Interestingly, Spencer never alleges that this was his first or only revocation. Thus he has failed to show that removal of the revocation at issue in his habeas petition would have any impact at all on a future parole, even through the roundabout way of being a single factor affecting a recommended time range for parole.

Spencer not only now adds new "injuries," he attempts to distinguish his case from *Lane v. Williams* by disavowing the very "injury" that was the basis for his claims in the court of appeals and the certiorari petition. Spencer now declares that he does not rely on the effect the Board of Probation and Parole's finding would have on any future parole consideration, though he then points to this consequence as one among several (Spencer Br. 40). Spencer acknowledges that this Court in *Lane v. Williams* rejected the effect of a parole revocation on future parole consideration as an allegation of injury sufficient to create jurisdiction.

Spencer cannot now so distance himself from that allegation of injury, and allege new injuries not alleged in his brief to the court below nor addressed by that court. It was his burden to prove jurisdiction in the court below. And this Court's precedents prevent him from presenting here a basis for relief not presented to the court below. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362-363 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[8] Spencer should be limited to establishing jurisdiction based on the injury he alleged in the court below and in his certiorari petition, *i.e.*, future effect of a parole revocation on a future parole hearing. And since he has failed to prove such an effect, his claim would fail even if this Court in *Lane* had not already rejected that effect as a basis for the continued federal court jurisdiction.

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[8] One exception allows a petitioner in a case that became moot on appeal to allege a new injury if mootness is attributable to a change in the legal framework governing the case that occurred during litigation and the new framework supports a claim of injury that was understandably not previously raised. In such a case a remand is appropriate for consideration of the impact of the newly alleged injury. *Lewis Continental Bank Corp.*, 494 U.S. 472, 478 (1990). This exception has nothing to do with Spencer, who has simply expanded the list of alleged injuries at the 11th hour to improve his argument.

D. Spencer's new claims are largely illusory, and even his speculative injuries are largely based on Spencer's underlying conduct, not the fact of a parole revocation.

Like his claim that his future parole eligibility might be affected, Spencer's newly identified injuries do not meet the three-part test set out in *United Food and Commercial Workers v. Brown Group*, 116 S.Ct. at 1533, and should be rejected under the reasoning this Court used in *Lane v. Williams*, 455 U.S. at 633-635.

i. **Sentence Enhancement**

Spencer alleges that under Missouri law, if he committed a future sexual offense and were convicted, he would be found to be a predatory sexual offender under MO. REV. STAT. § 558.018, (Supp. 1996). Predatory sexual offenders are subjected to an enhanced sentence, and are not subject to being discharged from parole following the conviction and completion of the new sentence (Spencer Br. 30-33). Spencer is right; he would be subject to § 558.018. But not because of his parole revocation. Spencer had already been convicted of sodomy at the time of his parole violation, and so already fit within this statute. *See* (J.A. 75). And even without such a conviction, his argument that this alleged collateral consequence defeats mootness would be meritless.

To fall within the enhanced sentencing provisions of this statute Spencer would have to be convicted of a specified sexual offense and the court sentencing him on the new conviction would have to find that Spencer had previously committed a specified sexual offense. *See*, MO. REV. STAT.§ 558.018 (Supp. 1996). It is speculative to assume Spencer would again commit a new sexual offense. It is

even more speculative to suggest that a court would blindly rely on the fact of a parole revocation when sentencing. The evidence of a sexual offense that was one factor in the revocation, not the revocation itself, would be relevant at a future sentencing. And victory in this case would not affect that evidence.

Moving from a future sexual offense to a claim that he might be convicted of a capital offense, Spencer next alleges that the 1992 parole revocation may be used to prove the statutory aggravating circumstance of a serious history of assaultive criminal convictions. But Spencer's claim that "[i]n Missouri the prosecution can adduce evidence of a parole violation to prove 'a serious history of serious assaultive criminal convictions' in the penalty phase of capital trial" (Spencer Br. 32) is not a correct statement of Missouri law. It certainly is not supported by the decision Spencer cites, *State v Nave*, 694 S.W.2d 729, 738 (Mo. 1985) (en banc), *cert. denied*, 475 U.S. 1098 (1986). In *Nave*, a prosecutor detailing a string of prior felonies in order to prove a history of convictions mentioned that while the defendant was on parole from two life sentences for rape and robbery, he was convicted of burglary and his parole was revoked. *Id.* at 738. This case does not stand for the proposition that parole revocations in Missouri can be used to show a prior history of serious assaultive convictions. Indeed, this proposition does not make sense, since a parole revocation is neither a conviction nor evidence of a conviction. A holding that a prosecutor's mention of a parole revocation while telling the jury of the conviction that caused it is not reversible error does not support the proposition that a parole revocation is proof of a statutory aggravating circumstance in a Missouri capital case. And it certainly does not make the possibility that the 1992 revocation would affect Spencer's chances of a death sentence anything more than wild speculation.

Leaving behind the specific contexts of sentencing in a sexual offense or capital case, Spencer next alleges that his parole revocation subjects him to enhanced sentencing under more generally applicable Missouri sentencing guidelines. Those guidelines are purely advisory, *see* MO. REV. STAT. § 558.019.6 (1994). But Spencer's assertion would be incorrect even if they were mandatory. Spencer alleges that a sentencing judge using the guidelines would have to find that his parole revocation terminated "a substantial period of crime-free living" and therefore that he was not entitled to mitigating consideration for that time (Spencer Br. 32, (citing MISSOURI SENTENCING ADVISORY COMMISSION GUIDELINES USER MANUAL 1997; henceforth GUIDELINES, at 18)). The passage on which Spencer relies, however, on its face specifically defines "a substantial period of crime free living" not to include "time served under [a criminal] sentence." GUIDELINES at 18. Spencer's assertion that he would be affected by this provision is illogical. Prior to his revocation, Spencer was serving time under a criminal sentence under the supervision of the parole board. Prior to that he was serving time in the Missouri Department of Corrections. Spencer's time spent in prison and on parole as part of a sentence for a criminal conviction would not count as a substantial period of crime free living under the Missouri guidelines, regardless of how Spencer behaved.

Further, nothing in the Missouri guidelines directs a sentencing judge to look at the fact of a revocation. Under the guidelines, the conduct that caused the revocation may be a relevant consideration in passing sentence. The revocation itself is not. In arguing otherwise Spencer ignores the fact that the Missouri sentencing guidelines treat criminal convictions much differently than parole revocations. Parole revocations are not even referred to in the guidelines, while criminal convictions are specifically identified as a

consideration in determining the criminal history of the defendant for sentencing purposes. *See* GUIDELINES at 7.

Apparently Spencer is not only convinced that he will commit a sexual, capital, or other Missouri crime, but that he might also commit a federal crime. Thus he argues that three specific portions of the United States Sentencing Guidelines would take into account that he had previously had a parole revocation: U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1(d), 1B1.4 and 4A1.3 (1994) (Spencer Br. 32-33). But he misreads all three.

The first section, § 4A1.1(d), provides that points are added to a criminal history computation if a defendant committed his current offense while under sentence for another crime. The fact that Spencer had his parole revoked in 1992 in no way qualifies him to have points added to his criminal history for sentencing purposes under this section. Spencer's sentence expired in October 1993. Spencer's 1992 parole revocation did not change that date. Even if Spencer were claiming that he committed some federal crime between his 1992 revocation and the end of his sentence in 1993, § 4A1.1(d) could not logically be read to subject Spencer to the threat of a future enhanced sentence based on the 1992 parole revocation.[9]

The second referenced portion of the guidelines, § 1B1.4, provides that a sentencing court may consider without limitation information about the background,

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[9] The only way Respondent can imagine this provision having anything to do with a parole revocation would be if a parolee was revoked and absconded, thus tolling the running of his sentence, and if the theoretical parolee then committed a federal crime while in absconder status, after his sentence otherwise would have expired. This hypothetical has nothing to do with the facts of Spencer's case.

character, and conduct of a defendant, unless otherwise prohibited from doing so by law, in determining whether to impose a sentence within the guideline range. This provision simply says that a sentencing court has the discretion to look at a defendant's background. This is exactly the type of discretionary consideration this Court held does not overcome mootness in *Lane v. Williams*, 455 U.S. at 633 n.13.

Finally, § 4.A1.3 provides that a sentencing court may consider imposing a sentence outside the guideline range if the criminal history determined from the guidelines does not adequately reflect the seriousness of the defendant's past criminal conduct. Prior *similar* conduct established by a civil adjudication or failure to comply with an administrative order may be considered for purposes of this provision. Thus, a sentencing court may in its discretion look at Spencer's 1992 parole revocation if he is ever convicted of a crime similar to those for which his parole was revoked. Regardless of whether it could consider the revocation, the court could, of course, look at information underlying the violation. But most important, this provision does not require a sentencing court to do anything; it merely permits it to keep part of the discretion it had prior to the adoption of the guidelines. Again, this exactly is the type of discretionary review that does not overcome mootness. *Lane v. Williams*, 455 U.S. at 633 n.13.

The provisions of the sentencing guidelines cited by Spencer do not establish that parole revocations must be considered in determining a defendant's criminal history. Sentencing guidelines require criminal convictions to be considered in sentencing. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (1994); U.S. SENTENCING GUIDELINES MANUAL §5A (1994) (sentencing table). Parole revocations are not criminal convictions. Though Spencer tries to tie

them together, the effects of a parole revocation and a criminal conviction on a future federal sentence are not similar. The former is merely one more piece of background data that a court may in its discretion consider for what it is worth. The latter has an inescapable effect on the sentencing calculus. It is fallacious to argue that since the sentencing enhancement consequences of a criminal conviction defeat mootness the consequences of a parole revocation must also do so.

ii. **Impeachment**

Taking a step beyond his claims that he might some day be denied parole or subjected to an enhanced sentence, Spencer next turns to the possibility that the revocation might harm his case at some future trial. Spencer first alleges that in Missouri his credibility may be impeached by a parole revocation should he testify at a future trial. This claim is simply wrong.

In support of his allegation, Spencer cites *State v. Comstock*, 647 S.W.2d 163, 164-166 (Mo.Ct.App. 1983), for the proposition that in Missouri a parole or probation violation may be used to impeach a witness--including a defendant in a criminal trial (Spencer Br. 33-34). *Comstock* does not support this proposition. In *Comstock*, a defendant charged with sodomizing another inmate while in prison testified that he would not have committed the crime for which he was on trial because "I had my parole and everything in line." *Comstock*, 647 S.W.2d at 164. On cross-examination the defendant explained why he was in prison: he had been convicted of stealing, placed on probation and the probation had been revoked for sodomy. *Id.* at 164. The prosecutor then questioned whether his testimony, that he would not do anything to jeopardize his parole, was consistent with his probation revocation. *Id.* at

164-165. The trial court overruled objections to this line of questioning, noting that the defendant had already testified about the probation prior to the objection. *Id.* at 164-165. The Missouri Court of Appeals affirmed the trial court, noting that the theory of error raised on appeal was different than that raised at trial; that the defendant opened up inquiry about his probation revocation through an unsolicited response, to which the prosecutor properly reacted; and that the comment was not so manifestly prejudicial as to constitute plain error. *Id.* at 165-166; *see* MISSOURI SUPREME COURT RULE 29.12(b) (noting that unpreserved claims of error may be reviewed when a court finds that a manifest injustice or miscarriage of justice has resulted).

The rule in Missouri is contrary to the one Spencer tries to find in *Comstock*. A witness, including a defendant, may be impeached based on a prior criminal conviction. But it is reversible error to go beyond this and bring out that the witness has breached parole. *See State v. Newman*, 568 S.W.2d 276, 278-282 (Mo.Ct.App. 1983). Thus, Spencer is not subject to general impeachment based on a parole revocation in Missouri. The revocation may be used to impeach Spencer only if he voluntarily brings it up or if the trial court commits reversible error, possibilities far too remote to create jurisdiction.

Second, Spencer alleges that his parole revocation for armed criminal action and forcible rape would be admissible to prove character or a trait of character where character or a trait of character is an essential element of a charge, claim, or defense under FED.R.EVID. 405(b) and similar Missouri case law. It is difficult to think of an hypothetical example in which aspects of Spencer's character that are shown by his revocation would be an essential element of a charge, claim or defense. More likely (and what Spencer really argues), the evidence that underlies the revocation would be presented to

establish character or the character trait. Because even if the parole revocation is removed the conduct underlying it remains the same, this alleged injury is not an injury in fact and it is not likely to be cured by a favorable decision. The admissibility of the rape and drug use under Fed.R.Evid. 405(b) to prove character or a character trait would be unaffected.

Finally, Spencer alleges that if at some future time he wishes to call witnesses to testify to his good character, his witnesses could be asked whether they knew about the parole revocation. As authority he cites Fed. R. Evid. 405(a) and the Missouri precedent of *State v. Sweet*, 796 S.W.2d 607, 614 (Mo. 1990) (en banc), *cert. denied*, 499 U.S. 1019 (1991). *Sweet* involved a character witness questioned about his knowledge of a defendant's prior *arrests* and their effect on his opinion of the defendant. *Sweet*, at 614. If witnesses who give opinions about a defendant's character may be asked about their knowledge of a prior arrest, they logically may also be asked about their knowledge of a parole revocation. But this type of questioning is not impeachment in the sense that a criminal defendant may be impeached by the fact of a prior conviction. Rather, it is an inquiry into the basis supporting opinion testimony.

The possibility that character witnesses will be asked if their opinions of a defendant's good character take into account a parole violation has little in common with the civil disability created by liability to personal impeachment through the fact of a criminal conviction. Impeachment by criminal conviction has a drastic impact on a defendant's right to testify in his own defense--a core liberty essential to our system of ordered liberty. The removal of a conviction removes its effect on a defendant's right to testify. But parole revocations have no impact on this core liberty. Further, removal of a parole revocation does not remove the

ability to challenge character evidence. Character witnesses may just as easily be asked if they are aware of a defendant's arrest for a crime and the recommendation that his parole be revoked for that crime. Additionally, a defendant who puts his character into question opens the door to evidence of the bad acts that led to the revocation, and this underlying evidence will still exist even if the revocation is removed. That Spencer would be a defendant, put his character in question, and be faced with testimony by someone who would be asked about the 1992 revocation rather than about the events that prompted it is a possibility too speculative and remote to justify further action in this case.

Spencer's decision to call the Court's attention to these evidentiary issues actually emphasizes the difference between the civil disabilities that result from a criminal conviction and the hypothetical and contingent effects identified by Spencer. Impeachment by criminal conviction is one among many collateral consequences that may keep a challenge to a criminal conviction viable after completion of a sentence. A criminal conviction is itself generally admissible for impeachment purposes. A parole revocation is not itself admissible for impeachment purposes, though in certain instances the conduct underlying a revocation may be used in a civil or criminal trial for a specific purpose. Alleged harm from the use of a parole revocation in a future judicial proceeding is so speculative as not to be an injury in fact. Because the alleged harm is unlikely to be remedied by a decision invalidating the revocation on procedural grounds, it is inadequate to establish jurisdiction after release from confinement.

iii. **FED.R.EVID. 413**

Taking a different approach to evidentiary effects, Spencer next alleges that under FED.R.EVID. 413 his parole

revocation may be used as substantive evidence should he be charged with sexual assault in a federal case. It is speculative to assume that Spencer will some day under some federal law be charged with sexual assault. Assuming, however, this were to occur, there would still be no injury in fact and no likelihood of remedy from a favorable decision overturning the parole revocation. It is the facts underlying the revocation, not the revocation itself that would be admissible and only then if their probative value outweighed their prejudicial effect. *See United States v. Guardia*, 955 F.Supp. 115, 117 (D.N.M. 1997) (noting that it is the consensus among judges, lawyers and legal scholars that FED.R.EVID. 403, which requires the probative value of evidence to outweigh its prejudicial effect, applies to evidence otherwise admissible under Rule 413). It is highly unlikely that a federal trial court would find the *fact* of a revocation to outweigh its prejudicial effect and admit it into evidence. The court would instead require proof of the underlying conduct. The revocation itself causes no injury in this context.

E. Spencer's claim that he cannot invoke 42 U.S.C. § 1983 would not have given the federal courts continuing jurisdiction even if he had made it below.

Next, Spencer alleges that the injury of preclusion from challenging his parole revocation in a suit under 42 U.S.C. § 1983 creates a case or controversy. There is no causal relationship here between the revocation process being challenged and the unavailability of a suit under § 1983. The only challenged conduct is alleged due process violations during Spencer's parole revocation proceedings. This conduct did not prevent Spencer from filing a §1983 suit. If Spencer is not able to file a § 1983 suit, it is the result of statutes and decisional law that limit the availability of § 1983 actions, not the fact that his parole was revoked. Thus Spencer

cannot demonstrate that a causal relationship exists between the alleged injury and the challenged conduct. *United Food and Commercial Workers v. Brown Group*, 116 S.Ct. at 1533. The conduct Spencer challenges in his habeas action is an element of a hypothetical damage suit under § 1983, not the reason the damage suit cannot be filed. Therefore preclusion from filing a § 1983, suit is not a collateral consequence of the parole revocation.

F. The Court should refuse to adopt Spencer's constitutionally unacceptable and impractical rule that mootness not be a consideration in handling habeas petitions.

Spencer claims that mootness is defeated by the hypothetical ills that he alleges may affect him in the future based on his 1992 parole revocation. These alleged injuries have little in common with the actual present civil disabilities that inevitably result from Spencer's criminal convictions. Spencer is essentially arguing that he can imagine circumstances in which a parole revocation could adversely impact his life. But that is not enough. As this Court noted in *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975), mootness exists unless a party can demonstrate perceptible harm and is not cured by pleadings that are "an ingenious exercise in the conceivable" in which a party demonstrates that he "can imagine circumstances in which he could be affected by the agency's action."

The kind of speculative harm from which Spencer would create jurisdiction would just as easily be caused by a prison conduct violation, a disciplinary transfer between institutions, a parole denial for bad conduct, or even an arrest. It would also be caused by the fact pattern in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), in which the case of a social worker challenging a requirement that she

perform her job in English was mooted when the social worker left her job. The petitioner in that case would certainly make an argument that if she at some point sought renewed government employment as a social worker, she would be hampered in the performance of her duty by the challenged law. Under Spencer's reasoning, that would be a winning argument.

Spencer's argument necessarily implies that either this Court's jurisprudence on mootness and the "case or controversy" requirement should be drastically modified, or that it simply should not be applied in cases involving parole revocations. He tries to phrase his request as one for an "exception" from the mootness rule. But mootness, derived as it is from constitutional limits on federal court jurisdiction, has never been susceptible to "exceptions." Spencer really wants to say that every judge who considers a mootness claim has to make some kind of undefined, equitable determination, after factfinding and based on such factors as how many days the state requested in which to respond--and why. The practical problems of such a change, in terms of managing judicial workloads, would be great but the damage to well established constitutional principle would be greater. There is no good nor constitutionally permissible reason to depart from well-reasoned precedents to take the difficult path to which Spencer directs us.

II. Spencer's situation cannot justify a disruptive and unfair rule giving preference to habeas petitions brought by those who are closest to release in the absence of judicial action.

A. Spencer's complaint about the inability of the district court to resolve his petition in the few months he was still in custody is not based on any constitutional violation.

As discussed above, Spencer seeks to justify a new rule in which mootness disappears as a basis for dismissing habeas petitions challenging parole revocations. But a portion of his argument, the part that pertains to the first question on which certiorari was granted, presents an alternative approach: if you maintain the general concept that habeas petitions challenging parole revocations become moot once a petitioner's sentence ends, then you should require federal courts to complete litigation of the case before that point is reached, or excuse mootness if the courts fail to perform this new duty. Such a rule would be unjustified, unprecedented, impractical, and unfair.

Spencer's proposed alternative rule is certainly not required by the Constitution. There is no right to have a habeas corpus petition decided in a specific amount of time. *See United States v. Samples*, 897 F.2d 193, 195 (5th Cir. 1990). Nonetheless, Spencer's case was heard and decided in just months by three state courts. His case was fully briefed before the district court hardly more than three months after his filing was complete. He was reparoled a few days later. His situation presents no justification for a rule requiring continued litigation of an otherwise moot claim.

There is no dispute that Spencer had access to the state courts of Missouri to litigate his claim. Spencer acknowledges that he litigated and exhausted his claim unsuccessfully in the circuit court of his county of confinement, the Missouri Court of Appeals, and the Missouri Supreme Court (J.A. 4-5). The judges of these courts are sworn to uphold the United States Constitution, and they did so. But that is not enough for Spencer. Though he was not denied access to court, he claims that he had a right to a decision in a federal forum. He insists that he was entitled to a final federal court decision on the merits before his claim became moot. Though he asserts that this right was of a

sufficient constitutional dimension to overcome the "case or controversy" requirement and require adjudication of a claim that would otherwise be moot, he is unable to cite a decision of this Court supporting his novel position.

Spencer's references to the habeas corpus act, 28 U.S.C. § 2254, and to 42 U.S.C. § 1983, are unavailing. Those are statutory remedies. They are not themselves constitutional provisions that exist independently of the requirement for a "case or controversy". This Court long ago recognized that there is no free standing federal constitutional right to a federal forum to collaterally challenge confinement by a state. *See Ex parte Dorr*, 3 How. 103, 104-105 (1845) (no jurisdiction to grant habeas relief to state prisoner absent statutory authorization even though prisoner had no practical way to otherwise access a federal forum). Modern decisions of this Court continue to implicitly acknowledge that principle. *See Heck v. Humphrey*, 512 U.S. 477, 489 n. 10 (1994); *see also Maleng v. Cook*, 490 U.S. 488, 493 (1989) (noting that collateral consequences of a criminal conviction do not independently justify habeas corpus review in a case in which a petition was not filed while the petitioner was in custody). If a constitutional right to federal review of habeas corpus claims existed, this Court's reasoning in *Maleng v. Cook* and the reasoning in cases on which *Maleng* was based would be unnecessary and nonsensical. *See Carafas v. LaVallee*, 391 U.S. 234, 237-239 (1968) (noting that jurisdiction to consider challenges to criminal convictions on which the sentences had been completed during habeas litigation flowed from the 1966 amendments to the habeas corpus act). There is no statutory authority for a rule requiring challenge to parole revocations to be decided before

a petitioner is released[10] and no constitutional doctrine that would permit a case to continue if it was not decided before it became moot upon a petitioner's release. Therefore, Spencer's new rule would be contrary to statutory law and, insofar as it sought to excuse mootness, unconstitutional.

B. Spencer's petitions were handled in a reasonable fashion by both three state courts and one federal court before his claim became moot.

Spencer acknowledges that his case moved through the Missouri courts from a trial court level to adjudication on the merits in the Missouri Supreme Court in the few months between his September 24, 1992, parole revocation and March 23, 1993 (J.A. 7-10). Spencer does not complain that Respondent or the Missouri courts delayed his case in the state courts and in fact in the district court he appeared to complain that the Missouri courts moved too swiftly (J.A. 104-105).

Spencer's brief on the merits repeatedly implies that Respondent acted negligently or in bad faith with the purpose of delaying a decision on the merits of Spencer's habeas corpus petition while the case was in the district court and that the district court breached a duty to decide the case in a timely manner (Spencer Br. 7-11, 18-23, 49-50). Nothing in the record supports either improper inference, and both should be disregarded. In fact, it was unreasonable for Spencer to expect the respondent and the district court to set aside equally important cases to give his case preferential treatment to insure it would be fully litigated before his pending release on parole and completion of his sentence.

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[10] Congress certainly knows how to indicate that a class of cases should receive expedited habeas corpus processing. *See* 28 U.S.C. § 2261-2266 (expedited processing of capital cases).

The record indicates that counsel for Respondent sought two extensions, both of which were based on the press of other cases (including habeas corpus cases), and that neither extension was designed to delay the case (J.A. 19-21, 26-27). The district court granted the extensions based on a showing of good cause (J.A. 21, 22-25, 30-36). Not only does nothing in the record refute the assertions in the extension motions and the findings of the district court as to why the extensions were sought and granted, the extensions had no real effect on the case becoming moot. Thus, it is illogical to argue that the extensions should provide a reason for excusing mootness.

Spencer filed the petition on April 1, 1993--approximately four months before the case was mooted by Spencer's re-parole on August 7, 1993 (J.A. 1, 30).[11] In order to avoid mootness, the district court and the court of appeals would both have had to complete work on the case by the time petitioner was reparoled. *See Watts v. Petrovsky*, 757 F.2d 964 (8th Cir. 1985) (dismissing a challenge to parole revocation as moot when the petitioner was reparoled after briefing of his case but prior to oral argument). There is no reason to believe that the case could have been jammed through the courts that quickly even if Respondent had responded to the show cause order on the very day it was received. *See* FED.R.APP.P. 31(a); *see also* EIGHTH CIRCUIT INTERNAL OPERATING PROCEDURES, APPENDIX A CHRONOLOGY OF EVENTS FOR A TYPICAL CIVIL APPEAL IN THE EIGHTH CIRCUIT (Revised October 1, 1991).

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[11] The case was not ready to be processed until the filing fee was received on April 15, 1993, a two week delay that cannot be logically blamed on Respondent or the district court. *See Weaver v. Pung*, 925 F.2d 1097, 1098-1098 (8th Cir. 1991) (noting that petition is not considered filed for purposes of creating subject matter jurisdiction until in forma pauperis status is granted or the proper filing fee is paid).

The district court asserted that the case would not be delayed beyond the demands of its docket (J.A. 127). There is nothing in the record that refutes the assertion of the district court. Both the respondent and the court did what they could and should have done during the brief period between the day the petition was filed and the day the case became moot. They did not resolve the merits of Spencer's claim in a federal court. But he had the chance to fully litigate his claims through three levels of state courts.

It would be impractical to require district courts and courts of appeals to expedite all habeas petitions in danger of becoming moot so that the petitions could be fully litigated through the federal appellate courts before mootness occurred. Completion of appellate, not just trial court action would be necessary to defeat mootness, since if mootness occurred at any stage of the proceedings the case would have to be dismissed. A petition filed, as was Spencer's, four months before a scheduled release on parole cannot be fully litigated in federal court in any time frame resembling the normal period for processing petitions before it becomes moot. Yet Spencer implies that a petition filed one week or one day before the petitioner's release must be fully litigated before mootness occurs. Neither Spencer's actual scenario (final decision required within four months) nor his proposed rule (all petitions finally decided before the petitioner's sentence ends, no matter how little time remains, how difficult the issues, or how burdened the court), is practical.

C. To require that the federal district courts and courts of appeals give priority to habeas petitions filed by those who will shortly be released without court action would be impractical and unfair.

Spencer explicitly argues his case should have been

singled out by Respondent and the district court for expedited review, and decided ahead of challenges to criminal convictions. He explains that because challenges to criminal convictions in habeas corpus actions generally involve long sentences, exhaustion requirements pose no obstacle to eventual review (Spencer Br. 19). Spencer argues parole revocation cases are special because the possibility of release upon reparole prior to exhaustion creates a great possibility that no federal forum will ever be available to review the revocation. *Id.* To the contrary, logic, fairness and habeas law dictate other priorities.

In demanding priority Spencer implicitly asks the Court to compare two prisoners: one who is serving a very long sentence with a petition that can easily be litigated long before expiration of the sentence, and one who is about to be released. According to Spencer, the court should delay acting on the petition filed by the first (thus leaving the prisoner incarcerated) and take up the petition filed by the second. Otherwise, Spencer cries, he is being denied an entitlement to federal habeas corpus review that is available to all those challenging criminal convictions in federal habeas corpus actions. (*See* Spencer Br. 19). That turns habeas jurisprudence on its head. How can a writ that was intended to release those unjustly imprisoned be the basis for a rule that gives those facing long periods of imprisonment a lower priority than those about to go free?

Spencer never explains how his proposed rule would co-exist with the requirement that a petitioner not challenge his confinement by a state authority in a federal habeas corpus action unless he has exhausted all remedies available in the state courts and he is still in custody. 28 U.S.C. § 2254(a), (b). Since exhaustion of state remedies can often take years, generally convictions resulting in short sentences cannot be reviewed in federal habeas corpus actions.

Therefore it is not surprising that most federal habeas corpus suits involve challenges to relatively long sentences. This does not demonstrate that petitioners challenging parole revocations are denied any entitlement to federal review provided to those challenging criminal convictions.

There is no sound policy reason for giving parole revocation cases special expedited treatment. Moreover, to require district courts to give such cases expedited treatment and excuse their mootness would undermine the exhaustion requirement of 28 U.S.C. § 2254(b) and the custody requirement of 28 U.S.C. § 2254(a). *See Maleng v. Cook*, 490 U.S. 488, 493 (1989) (noting that allowing review of petitions filed after the expiration of sentence would read the in-custody requirement out of the habeas corpus statute and be contrary to the clear implication of earlier precedent). If Spencer's case was guaranteed a decision prior to mootness, and if failure to decide the case excuses mootness, then all cases involving relatively short sentences that now cannot receive federal habeas review because of release prior to exhaustion of state remedies would also logically receive federal habeas review. This is because an inherent right to review of sufficient constitutional dimension to overcome the "case or controversy" requirement would necessarily overcome the statutory exhaustion and in-custody requirements set out in 28 U.S.C. § 2254. Were that so, there is no logical reason why former prisoners who had been released from state custody prior to exhausting state remedies could not assert their newly created constitutional right to a federal forum, to press their complaints. There is no jurisprudential support for going down this path.

Congress could have drafted a habeas corpus statute so broad that short terms of confinement or fines were reviewable through habeas corpus in the federal courts. It did pass the Antiterrorism and Effective Death Penalty Act of 1996.

Spencer claims that act somehow supports the premise that his case is not moot. (Spencer Br. 48-49). This act was not an attempt to interpret the "case or controversy" requirement of Article III, Section 2 of the United States Constitution, nor could Congress constitutionally pass an act interpreting this provision differently than this Court interpreted it in *Lane v. Williams*. Insofar as Spencer is alleging an intent to require expedited handling of parole revocation cases consistent with the "case or controversy" clause, there is absolutely no evidence in the text to support this. *See* 28 U.S.C. §§ 2254, 2261-2266. In any event this intention would not overcome the fact that no "case or controversy" has existed since August 1993. Spencer's first argument essentially seeks to expand federal jurisdiction without any constitutional or statutory support, based on his own view that it is unfair that his claim became moot while it was being adjudicated. Spencer's claim that his habeas corpus petition is not moot must stand or fall based on whether a "case or controversy" exists that creates jurisdiction for review. Spencer's first argument contributes nothing to establish such jurisdiction.

The path Spencer advocates is an impractical and unnecessary change from well established doctrines. The ultimate end of this path would be a judicial system very different from the one that now exists. Consideration of Spencer's proposed right to a federal forum together with his broad view of injuries sufficient to create jurisdiction dramatically points out the impracticality of his arguments and why the law is what it is, not what Spencer would like it to be. There is no constitutional right to a federal forum sufficient to overcome the "case or controversy" requirement and by implication the statutory requirements of exhaustion and custody in habeas corpus cases. If there were, any person who is or has been under arrest or who has paid a traffic ticket could pursue habeas corpus relief if he could show a sufficient injury. Since an arrest could be used in

questioning of a character witness, or could be considered in discretionary sentencing decisions, or could be part of a showing of character in a capital murder in penalty phase, a "case or controversy" would exist. Therefore an action filed in habeas corpus would exist for the expungement of state arrest records. Similarly a traffic violation could enhance future penalties for future violations and would also create a cause of action in federal habeas corpus. If the law were as Spencer argues it should be, these admittedly extreme examples logically should be permitted to occur. The law is, however, that there is no jurisdiction for review absent a "case or controversy" as this Court has defined the term. It should not change.

Conclusion

For the foregoing reasons, Respondent prays the Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON
Chief Deputy Attorney General

STEPHEN D. HAWKE
Assistant Attorney General

STACY L. ANDERSON
Assistant Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Counsel of Record

Post Office Box 899
Jefferson City, Mo 65102
(573) 751-3321

Attorneys for Respondent